THE STATE BAR OF CALIFORNIA
COMMISSION FOR THE REVISION OF
THE RULES OF PROFESSIONAL CONDUCT

DRAFT MEETING SUMMARY - OPEN SESSION

Friday, February 21, 2003
(10:00 am - 12:30 and 1:30 - 4:45 pm)
Saturday, February 22, 2003
(9:00 am - 4:00 pm)

San Francisco - State Bar Office
180 Howard Street, Room 8B
San Francisco, CA 94105
(415) 538-2167

MEMBERS PRESENT: Harry Sondheim (Chair); Linda Foy; JoElla Julien; Stanley Lamport; Raul Martinez; Kurt Melchior; Ellen Peck; Hon. Ignazio Ruvolo; Jerry Sapiro; Mark Tuft; Paul Vapnek; and Tony Voogd.

MEMBERS NOT PRESENT: Karen Betzner; and Ed George.

ALSO PRESENT: David Boyd (Sacramento County Bar Liaison); Hon. Samuel Bufford (Los Angeles County Bar Liaison); Randall Difuntorum (State Bar staff); Demetrios Dimitriou; Diane Karpman (Beverly Hills Bar Association Liaison) [via video conference link to State Bar Los Angeles office]; Lauren McCurdy (State Bar staff), Kevin Mohr (Commission Consultant); Marie Moffat (State Bar General Counsel); Toby Rothschild (Access to Justice Commission Liaison) [via video conference link to State Bar Los Angeles office]; Ira Spiro (State Bar ADR Committee Liaison); and Mary Yen (State Bar staff).

I. APPROVAL OF OPEN SESSION ACTION SUMMARY FROM NOVEMBER 8, 2002 MEETING

The open session summary was approved.

II. REMARKS OF CHAIR

The Chair addressed two general administrative matters. First, the Chair announced that lead drafters will be identified for each co-drafter team. Like COPRAC's process, a lead drafter would be responsible for ensuring timely completion of an assignment in accordance with the assignment schedule set forth by staff and for presentation of the assignment at the meeting. If a lead drafter is unable to fulfil these responsibilities, then

the lead drafter should find a substitute member to act as lead and promptly notify the Chair and staff.

Second, the Chair emphasized an interest in having members exchange informal comments prior to meetings. It was indicated that the Chair may monitor a member's participation in e-mail comments and then later exercise discretion during meetings to limit a member's opportunity to comment at the meeting if that member has not commented prior to the meeting regarding materials which have been sent out as part of the agenda materials. The Chair invited member comments on this proposed procedural exercise of discretion by telephone or e-mail by March 4, 2003.

A. Report on the SEC's Adoption of Attorney Conduct Rules Pursuant to Section 307 of the Sarbanes-Oxley Act, and Written Comments of: the Corporations Committee of the State Bar Business Law Section; the State Bar Litigation Section; the National Organization of Bar Council; and the Conference of Chief Justices.

The Chair called attention to the SEC comment materials included in the agenda package. Mr. Difuntorum reported on: (1) the SEC's adoption of attorney conduct rules pursuant to sec. 307 of the Sarbanes-Oxley Act of 2002; (2) the SEC's public comment proposal on "noisy withdrawal" rules and an alternative to the "noisy withdrawal" proposal; and (3) the 2003 ABA Annual Meeting and the ABA House of Delegates consideration of proposed ABA Model Rule 1.6 amendments developed by the ABA Task Force on Corporate Responsibility.

Mr. Tuft reported on the February, 2003 ABA MidYear Meeting in Seattle and provided additional information concerning the upcoming ABA House of Delegates meeting. Following discussion, the Commission determined to recommend that COPRAC, consistent with the authority granted by the Board, take action to provide comment to the ABA and to work with the State Bar's ABA delegates in lobbying other ABA delegates, in particular non-California delegates. The Chair noted that interested members, acting in a personal capacity and not on behalf of the Commission, may assist COPRAC in its efforts. Mr. Difuntorum indicated that COPRAC's discussion of comment to the ABA or the SEC would be an open session matter.

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III. MATTERS FOR ACTION

A. Further Discussion of the First Two Paragraphs of the Tentatively Adopted Rule 1-100 Language Found on Pages 8 and 9 of the November 8, 2002 Meeting Summary. This Discussion Will Include (A) Consideration of Whether the Text of These Two Paragraphs Should Be Deferred to Some Future Time and (B) Irrespective of What We Ultimately Decide Regarding Whether the Rules Have a Purpose Other than Discipline, Is it Accurate to State That the Purposes of the Rules Can Be What Is Currently Stated on Page 8, I.e. Can Each Rule Serve All 4 Purposes or Do Some of the Rules Only Serve Some of the Purposes.

The Chair summarized the Commission's November 22, 2002 discussion of RPC 1-100(A). Regarding language stating the disciplinary function of the rules, the Commission discussed whether draft language or a concept of draft language could be agreed upon on a tentative basis. For discussion purposes, the following language was suggested:

> "These rules regulate attorney conduct and may result in discipline for a wilful violation of any of these rules."

Among the points raised during the discussion were the following:

(1) Consideration should be given to the ABA approach specifying that violation of "an obligation or a prohibition" found in the rules is a basis for discipline.

(2) Whatever formulation may be used to specify a disciplinary function will not prevent the courts from using the rules for other purposes, such as malpractice, disqualification and fee disputes.

(3) Civil liability currently is covered in paragraph 4 of RPC 1-100(A) and that language has not been discussed.

(4) The text or discussion of each rule could include explicit language indicating its intended disciplinary and/or non-disciplinary function.

(5) The 1987 "legislative history" clarifies the intended disciplinary function of the rules and any change must be thoroughly explained for the benefit of the Supreme Court, State Bar Trial Counsel, lawyers, and members of the public.

(6) Consideration should be given to adapting the language used by the ABA in the Model Rules Preamble and Scope, specifically paragraphs [14], [19] and [20].

(7) The text of the rules should not be burdened by too many objectives, rather, each rule should be confined to a clear statement of a standard and concise comment on "why" the rule exists – a rule should not: (i) describe methods for compliance as that is a matter of law practice management; or (ii) attempt to

address interpretation issues as that is the job of ethics committees and the courts.

(8) Carving out certain rules as non-disciplinary seems appealing but creates the additional complication of implying a standard of care, and if a standard of care is disclaimed, then the question arises as to what regulatory impact is intended in having that rule.

(9) As a practical matter, attempting to craft the rules as a "one size fits all" compilation of professional standards with categories of disciplinary and non-disciplinary provisions likely is too ambitious for one document and this becomes apparent when considering the Commission's current debate on whether it is productive to attempt to integrate all State Bar Act disciplinary provisions into the rules.

(10) The purpose of the rules, in general, as well as any particular function of a specific rule, must be understandable to the average member of the bar.

(11) Education on basic professional responsibility issues should not be lost in the effort to resolve the discipline v. guidance debate.

(12) The Commission should proceed to complete its work on all other matters and then revisit RPC 1-100(A) as the experience gained in that exercise will make it easier to characterize the over-arching purpose of all of the rules.

(13) Assuming a tentative agreement is reached on RPC 1-100(A), consideration should be given to *not* posting that tentative language on the website.

(14) The rules that the Commission and the State Bar sends to the Supreme Court must be comprehensive rules of attorney conduct and not simply disciplinary standards or else other regulators (i.e., the legislature, the federal government, or trial courts) will fill the void that is left unaddressed.

Following discussion, the Commission voted (9 yes, 2 no, and no abstentions) to approve the following language as a concept and an initial draft for future "fine-tuning":

> "These rules regulate attorney conduct and a willful violation of any of them may result in discipline."

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B. Consideration of Rule 1-100. Rules of Professional Conduct, In General

Regarding the third and fourth paragraphs of RPC 1-100(A), the Commission determined to defer any immediate work on these provisions until some future time. At such time, Mr. Lamport will be designated as the lead drafter.

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C. Consideration of Rule 1-120X. New Rule Proposal Arising from Discussion of Rule 1-120 re Incorporating Case Law and B&P Code Provisions

The Commission considered a discussion draft of a proposed new rule presented by Ms. Peck and Mr. Vapnek. Ms. Peck noted the Commission's prior interest in making this proposal parallel to MR 8.4 and in crafting a replacement for Bus. & Prof. Code §6068 (f) re "offensive personality." The Chair asked for a discussion of whether the concept of this proposal should be pursued?

Among the points raised during the discussion were the following:

(1) The concept of this rule does not adequately deal with the obvious potential for duplicative disciplinary charges.

(2) Consideration should be given to eliminating, as opposed to codifying in the rules, the concept of "moral turpitude" as many other states have abandoned this antiquated standard.

(3) The average lawyer should not have to undertake a difficult search to find attorney misconduct standards.

(4) The concept of this rule involves the strategy of ultimate deletion of statutory attorney conduct provisions.

(5) California's statutory and common law attorney misconduct standards are worrisome to law students who look primarily to rules of professional conduct as setting attorney professional responsibility standards.

(6) The concept of this rule would create a false impression that the rules of professional conduct are complete because there are too many discrete statutory concepts that will not be included and, in any event, the Legislature's active work in the regulation of attorney conduct will render the rule obsolete upon promulgation.

(7) Although discipline case law has evolved and effectively nullified prior concerns about duplicative disciplinary charges, the advent of this rule would create new civil liability issues arising from the "codification" of common law standards.

(8) Sometimes "half a loaf" is the best that you can do – the concept of this rule could utilize an express "including but not limited to. . . " drafting strategy.

(9) "Codifying" the common law doctrine of "other misconduct warranting discipline" may make it more difficult for the courts to narrow it or abolish it.

(10) Education can be achieved without expanding the rules by promoting the Rutter Guide, the Compendium, and other California based legal ethics books. Electronic legal research methods now, and in the future, may limit the need for a comprehensive rule document

(11) The concept of this rule should not be misconstrued as a plan to place everything in a new RPC 1-120X, instead, the concept acknowledges the potential for incorporating certain statutory or common law concepts in other places in the rules (i.e, in a possible new global terminology rule), thus making RPC 1-120(X), itself, merely a California counterpart to MR 8.4.

(12) Consideration should be given to incorporating the Commission's tentatively approved proposed amended RPC 1-120 into new RPC 1-120X.

(13) If this rule goes forward, then the discussion section and the rule's "legislative history" must be explicit on the differences between the rule and MR 8.4 – California's rule should not be a misleading or false counterpart to the ABA rule.

Following discussion, the Commission voted (6 yes, 3 no, and 1 abstention) to continue with the concept of a new rule 1-120X.

Mr. Vapnek was identified as the lead drafter. Mr. Mohr volunteered to research which states still have a moral turpitude standard.

The Commission next discussed specific guidance to the drafting team. Among the points raised during the discussion were the following:

(1) Regarding moral turpitude, the team should review the Supreme Court's discussion in In Re Lesansky (2001) and the Review Department's Valinoti disciplinary case~~s~~, as well as the body of law on moral turpitude in California jurisprudence.

(2) Moral turpitude as applied to teachers may be helpful.

(3) The rule should focus on the duties of attorneys under Bus. & Prof. Code §6068(e), (f), and (g) but not (a), (b), or (c) as those subdivisions contain concepts prone to abusive regulation.

(4) Don't import statutory or common law vagueness, attempt to recast in a way that meets the specificity requirement.

(5) The language "other misconduct warranting discipline" should be deleted or revised as it is meaningless outside of the case law context.

(6) Concepts considered but rejected for inclusion in the rule should be mentioned in the rule discussion section.

[Note: the following action occurred during the discussion of rule 1-120X but concerns a global rule revision issue.]

In addition to specific drafting guidance, the Commission considered a proposal that all rule discussion sections be formatted with numbered paragraphs similar to the ABA Model Rule comments. Following discussion, the Commission agreed unanimously to implement numbered discussion section paragraphs in all of its proposed rule amendments. However, it was understood that in the case of California rules with ABA counterparts, the content of a numbered discussion paragraph to a California rule may not correspond to the content in the numbered comment paragraph in the ABA counterpart rule.

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D. Consideration of Rule 1-300. Unauthorized Practice of Law

Ms. Peck presented a February 19, 2003 memorandum on proposed amendments to RPC 1-300 to define "practice of law" and/or "unauthorized practice of law". The memorandum offered discussion drafts of a proposed amended RPC 1-300. Ms. Peck requested comments on the approach taken in the discussion drafts, which reflect a Birbrower model to defining "practice of law", and a presumption model of activities indicative of the "practice of law" and the unauthorized practice of law. Among the points raised during the discussion were the following:

(1) The presumption model raises questions of how to overcome a presumption, what triggers a presumption, and how meaningful would the presumptions be in practice?

(2) Although anti-trust concerns recently have been asserted against the ABA in its effort to develop a model definition of the practice of law, the Commission's work differs because the process of Supreme Court adoption qualifies as state action.

(3) Consideration should be given to crafting a definition of the practice of law as a stand alone rule, not a part of RPC 1-300, or as a part of a new terminology or global definitions rule.

(4) Rules of professional conduct adopted by the State Bar and approved by the Supreme Court are not the equivalent of legislative enactments and it may not be appropriate for any rule to set forth presumptions of statutory violations.

(5) "What is the practice of law?" is a different question from "what is the unauthorized practice of law?"

(6) A rule of court, not a rule of professional conduct, is the proper place for a definition of the practice of law and even this approach requires a clear understanding of the purpose and function of the definition.

(7) RPC 1-300 is a disciplinary rule for members who engage in unauthorized practice of law activities, which can be addressed separate and apart from the challenging task of defining the practice of law. Consideration should be given to handling RPC 1-300(A) & (B) without regard to the prospect of a definition.

(8) Further work on this matter should include a review of the DOJ and FTC letter to the ABA that discusses *de facto* authorized practice of law activities.

(9) A difficulty with defining "practice of law" is that activities deemed to be the practice of law when performed by a lawyer may not be regarded as the practice of law when performed by a non-lawyer. Similarly, definition of "unauthorized practice of law" for attorneys may differ from "unauthorized practice of law" by

non-attorneys. If a definition is adopted, it should be made clear that it is applicable in the context of the legal profession.

(10) Without a definition of "unauthorized practice of law", enforcement of a rule on UPL is problematic. Similarly, since "practice of law" is used in other rules such as 1-600, 1-300, 1-310 and 1-311, the term should be defined.

(11) Activities deemed to be the practice of law when performed by a lawyer may not be regarded as the practice of law when performed by a non-lawyer.

(12) Unlike lawyers, the consulting activities of accountants are not bound by state or national borders.

(13) If the Commission proceeds with defining the practice of law, then careful attention must be given to ADR activities and the big issue of whether arbitration or mediation is a practice of law activity.

(14) Representational activities pursuant to state and federal administrative law must be addressed.

(15) The Commission can use a three track approach in analyzing RPC 1-300: (1) subdivision (A) re aiding in the unauthorized practice of law; (2) subdivision (B) re violating the regulation of the practice of law in a jurisdiction other than California; and (3) a definition of the practice of law.

(16) Consideration should be given to deleting RPC 1-300(B) because it primarily involves the problems of a non-California jurisdiction.

(17) In RPC 1-300(B), it is unclear whether the term "jurisdiction" is limited to states and countries or if Patent, SEC, etc... may be regarded as a "jurisdiction."

Following discussion, the Commission determined to proceed with the suggested three track approach to analyzing the issues presented by RPC 1-300. Mr. Martinez, Mr. Melchior, and Ms. Peck (designated lead) were assigned to continue the study of a definition of the practice of law. Mr. Martinez, Ms. Peck, and Mr. Tuft (designated lead) were assigned as the drafting team to analyze RPC 1-300(A) & (B). Mr. Difuntorum indicated that any actual work on a definition of the practice of law should await the issuance of a report from the Supreme Court's Advisory Committee on the Implementation of MJP Recommendations. However, the Commission could initiate an analysis of which rules, State Bar Act provisions, and other authorities would be impacted by a new definition.

E. Consideration of Rule 1-310. Forming a Partnership With a Non-Lawyer

Mr. Tuft presented a February 20, 2003 memorandum on proposed amendments to RPC 1-310. The memorandum offered four discussion drafts of a proposed amended RPC 1-310. The Chair invited discussion of: (i) whether there should be any rule at all; and (ii) assuming some form of the rule is continued, the issues raised by the various directions for possible amendment. Among the points raised during the discussion were the following:

(1) Most states have a rule like RPC 1-310 and consideration should be given to simply updating the rule in light of what the ABA and other states have done.

(2) The threshold issue raised by RPC 1-310 is whether regulation of forms of practice is an appropriate subject for a rule of professional conduct.

(3) Regulation of forms of practice poses a serious practical obstacle because it is very hard to define any particular form and new forms tend to emerge and defy existing definitions.

(4) The concept of MDP seems to be aimed at permitting conduct that otherwise is regarded as prohibited.

(5) Lack of enforcement is a problem with this rule since it addresses only one form of practice with a non-attorney.

(6) The rule should be eliminated to allow new opportunities for innovative delivery of services at low prices to the consumer. The market place is best regulator for forms of practice. Rules 1-600 and 1-320 would afford adequate public protection in the absence of this rule.

(7) If this rule is deleted but rules 1-600 and 1-320 are continued, then it would still be helpful to have the requirement for lawyer independence expressed in a more direct manner. The purpose of the rule is to protect the independent professional judgement of attorneys to ensure the attorney is in control of the lawyer function. There is also concern for making the delivery of legal services available to the public.

(8) The rule is important because it protects the professional independence of a lawyer in circumstances where it is most vulnerable to outside influence – non-lawyer capital and equity control renders it impossible to maintain professional independence.

(9) Consideration should be given to the issue of whether the “for-profit” nature of a particular form of practice is a determinative factor.

(10) An amendment to the rule should be explored along the lines of MR 5.4(d).

(11) A lawyer's focus on demonstrating value to a client should not be distracted by a practical need to demonstrate value to a non-lawyer partner or shareholder.

(12) The Commission must be careful to avoid unintended consequences to the regulation of dual-occupation or dual-licensee activities.

(13) The real world is a multi-disciplinary world and the issue of how best to ensure that a lawyer is in command of lawyer functions, regardless of the form of practice, is an issue that should be discussed fully before proceeding to debate what type of rule, if any, is needed.

(14) Profit v. non-profit is not a productive line of inquiry, instead, the focus should be on balancing full-client service against necessary controls to ensure independent professional judgment.

(15) The requirement for professional independent judgment could be stated positively in a rule, i.e.," thou shalt maintain professional independent judgment."

(16) The regulation afforded by this rule is interrelated to the regulation of UPL and fee splits.

(17) The Commission must account for the variable of conduct involving the use of the internet for both advertising and rendering a variety of professional services.

(18) The ability of solos and small firms to enter into relationships that reduce the cost of professional services deserves as much attention as the conduct of national or global professional service firms.

(19) The broad policy discussion of the purpose of this rule suggests a inextricable connection between MJP and MDP.

Following discussion, the Commission considered a recommendation that the Commission adopt the position that there should be no rule, whatsoever, on the topic of 'forming a partnership with a non-lawyer.' A vote to ascertain consensus revealed little support for this position. The Commission voted 2 yes, 9 no, and no abstentions.

The Commission next considered a recommendation that a drafting team be assigned the task of developing an issues outline for further discussion of proposed amendments to RPC 1-310. The Commission determined to proceed with the issues outline by a vote of 10 yes, 0 no, and 1 abstention. Mr. Martinez, Ms. Peck, and Mr. Tuft (designated lead) were assigned as the drafting team. In proceeding with an issues outline, it was agreed that ABA MR 5.4 would provide a framework for the issues outline and that the drafting team would address the threshold question of whether a rule of professional conduct should regulate a form of practice rather than lawyer conduct. It was further agreed that the

members of this RPC 1-310 drafting team would assume responsibility to coordinate a study of two other rules involving lawyer independence, rules 1-320 and 1-600, as well as coordinating the study with rule 1-300(A) and (B). (See item III.D., last paragraph.)

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F. Consideration of Rule 1-311. Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member

The Chair indicated that Mr. Voogd (designated lead) and Mr. Lamport are assigned to provide an initial report and recommendation on proposed amendments to RPC 1-311. It was noted that Mr. Lamport and Mr. Tuft worked with State Bar staff in developing this rule. A few points were made in response to the Chair's announcement of the assignment, including the following.

(1) Consideration should be given to leaving this rule alone, as it was developed by State Bar Trial Counsel to serve a very narrow purpose.

(2) The rule addresses the serious problem of disciplined lawyers continuing to practice law under the auspices of another member but the question arises as to whether the specific terms of the rule are overkill, especially the client notice provision in 1-311(D).

(3) The burden of compliance imposed by the rule could be modified to eliminate client notice but maintain notice to the State Bar; however, a major objection to this modification can be anticipated based on interests of public protection and a client's right to know.

Following discussion, the Chair encouraged the drafting team to explore all possible directions for addressing RPC 1-311.

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G. Consideration of Rule 1-320. Financial Arrangements With Non-Lawyers

Mr. Martinez presented a February 19, 2003 memorandum on proposed amendments to RPC 1-320. The memorandum offered background on the rule and possible issues to address by proposed amendments. Mr. Martinez requested general comments in response to the memorandum. Among the points raised during the discussion were the following:

(1) As in the case of RPC 1-310, consideration should be given to whether there is a real need for this rule, whether the core values it is intended to protect can be preserved without it.

(2) The rule represents dual-purposes, a running-capping prohibition and guidance to lawyers on how to structure and implement financial arrangements, including compensation to non-lawyer staff.

(3) The formulation of this rule is awkward in that the broad exceptions describe scenarios that reasonably may be interpreted to swallow the prohibition. In addition, these exceptions seem to be crafted more as 'safe harbors' rather than true exceptions as they involve conduct that likely does not implicate the actual narrow purpose of the rule. The Ojeda case reflects this reading of the rule.

(4) The disconnect between the prohibition in subdivision (A) and the exception in subdivision (C) prompted the analysis found in fee split ethics opinions developed by the Los Angeles County Bar and COPRAC. In turn, these ethics opinions ultimately influenced the Supreme Court's decision in Chambers v. Kay.''

(5) The conceptual issue raised by this rule is whether the rules of professional conduct should attempt to regulate law firm compensation arrangements.

(6)The drafting team should review the Flannery v. Prentice case to see what clarification might be suggested to deal with fee awards.

(7) The effectiveness of this rule in deterring illegal running and capping should not be ignored as this is an important practical effect of this prohibition. In these situations, the rule offers bright-line guidance, particularly to new attorneys who are susceptible to manipulative non-lawyers who portray themselves as office managers or marketers. See the State Bar Court Review Department's recent decision in Valinoti.

(8) One approach is to list the 'evils' to be prohibited in order to see what conduct is regarded as acceptable. The Commission may find that some of the conduct on that list may actually be okay so long as some protective step is required, i.e., client disclosure/consent. This permissive approach to regulation may be a way of balancing competing interests.

(9) The context of public benefit non-profit representations requires close consideration so as to avoid unintended effects on the ability of public interest law firms to contribute portions of fees to the non-profit client entity. The PCLM case should be studied.

(10) Class action matters are an area that should receive special attention from the drafting team.

(11) This rule explicitly governs the conduct of a "law firm" not just individual lawyers and this places before the Commission the broader conceptual issue of law firm regulation/discipline under the rules of professional conduct and the State Bar Act (see Bus. & Prof. Code sec. 6132).

(12) The Commission must account for the reality of cross-referral understandings between international firms and businesses.

Following discussion, it was agreed that the drafting team of Mr. Martinez, Ms. Peck and Mr. Tuft (designated lead), would handle RPC 1-320 as part of its work on other related lawyer independence rules, rules 1-310 and 1-600. It was suggested that within the team, Mr. Martinez could remain as the lead for RPC 1-320.

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H. Consideration of Rule 1-200. False Statement Regarding Admission to the State Bar – Further Consideration of Tentatively Approved Rule

The Chair provided an explanation for the reconsideration of this tentatively approved rule. Ms. Foy and Mr. Sapiro summarized a February 7, 2003 memorandum identifying the Chair's suggestion for further amendments. The Chair invited comments on the suggestion that the tentatively approved rule be modified, in the rule text or in the discussion section, to cover the issue of a lawyer's continuing obligation to correct a mis-statement about the qualifications of an applicant while that application is still pending. The Chair noted that the comparable ABA model rule, MR 8.1, covers this issue. Among the points raised during the discussion were the following.

(1) The proposal to limit the obligation to the time period when the application is pending seems to suggest a parallel with a lawyer's general duty of candor to a tribunal and this is a separate, distinct and major topic that should not be addressed in the context of a RPC 1-200 sub-issue.

(2) The proposal also shares qualities with the "snitch rule" that for now has been rejected by a majority of the Commission in connection with RPC 1-120.

(3) The issue might be genuine in the abstract but there may be no incidents of a real world problem. Moreover, the benefits of solving this abstract problem are outweighed by resultant potential for confusion that the modification is likely to cause in the general interpretation of the rule ,and potential for trapping unwary attorneys who do not know about the obligation imposed on them in the narrow situation where it applies..

(4) A real world problem is suggested by the In re Lamb scenario.

(5) Consideration of this issue should be tabled as to RPC 1-200 but flagged for consideration when the Commission looks at the duty of candor under RPC 5-200.

(6) The question can be recast as whether a rule change is needed to establish a very specific new basis of discipline to prosecute those character witnesses involved in a pending application or reinstatement process who make statements initially believed to be correct but are then discovered to be false and who are not motivated to correct the misinformation by either: (1) a moral or legal obligation not found in the rules (i.e., if testifying, by penalties for perjury); or (2) the ethical duty of honesty and candor to a tribunal.

Following discussion, the Commission considered whether to adopt the concept of the suggested modification for implementation in the rule text. The Commission determined not to adopt the suggested modification in the rule text by a unanimous vote. The Commission next considered whether to adopt the concept for implementation in the rule discussion section. The Commission

determined not to adopt the suggested modification in the rule discussion section by a vote of 3 yes, 7 no and 1 abstention. Although the Commission voted against the suggested modification in connection with this rule, staff was asked to flag the issue for consideration when the Commission takes up RPC 5-200 and the duty of candor.

As the process for consideration of the Chair's suggested modification placed before the Commission the final version of the drafting team's proposed amendments to RPC 1-200 that were previously approved subject to a mail ballot, it was the unanimous consensus of the members present that no mail ballot would be needed. Accordingly, staff was directed to work with Mr. Mohr to prepare the tentatively approved rule for posting on the State Bar website. The text of the tentatively approved proposed amended rule is set forth below.

Rule 1-200. False Statement Regarding Admission to Practice Law

(A) An applicant for admission to practice law shall not knowingly make a false statement of material fact or knowingly fail to disclose a material fact in connection with that person's own application for admission.

(B) A member shall not knowingly make a false statement of material fact in connection with another person's application for admission to practice law.

(C) As used in this rule, "admission to practice law" includes admission or readmission to membership in the State Bar; reinstatement to active membership in the State Bar; an application for permission to appear *pro hac vice;* and any similar provision relating to admission or certification to practice law.

Discussion:

[1] A person who makes a false statement in connection with that person's own application for admission to practice law may, *inter alia*, be subject to subsequent discipline under this rule if that person is admitted.

[2] The examples in paragraph (C) are illustrative. As used in paragraph (C), "similar provision relating to admission or certification" includes, but is not limited to, an application by an out-of-state attorney for admission to

practice law under Business and Professions Code section 6062; proceedings for certification as an Out-of-State Attorney Arbitration Counsel under Rule of Court 983.4, Code of Civil Procedure section 1282.4, and related State Bar Rules; and certification as a Registered Foreign Legal Consultant under Rule of Court 988 and related State Bar Rules.

[3] This rule shall not prevent a member from serving as lawyer for an applicant for admission to practice in proceedings related to such admission. Other laws or rules govern the responsibilities of a lawyer representing an applicant for admission. See, e.g., Bus. & Prof. Code § 6068(c), (d) & (e)); Rule Prof. Conduct 5-200.